

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEONEL MICHEL VARGAS,

## Defendant

Case No.: CR-13-6025-EFS

# **Motion and Memorandum To Suppress Evidence from Continuous Video Surveillance Pole Cam**

**October 8, 2013 @ 1:45 p.m.  
With Oral Argument**

## MOTION

Defendant LEONEL MICHEL VARGAS moves the Court to suppress all evidence obtained by the police from the surreptitious, long term, continuous live and recorded video surveillance of the defendant's home with a pole camera capable of remote pan and zoom installed without a warrant.

This Motion is based upon the Fourth Amendment to the United States Constitution and the authorities set forth in the Memorandum of Authorities herewith filed.

**MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS- 1**

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1 MEMORANDUM  
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## SUMMARY OF ARGUMENT

4 It is respectfully submitted that a warrant is required for police to conduct a  
5 criminal investigation by secretly installing a pole camera with remote pan and zoom  
6 capability to acquire continuous, long term video surveillance of the area near the  
7 defendant's home. No warrant was requested, no exception applies, and all evidence  
8 derived from the video surveillance should be suppressed.

9 SUMMARY OF FACTS  
10

11 A gang task force secretly installed the video pole camera without requesting a  
12 warrant. They suspected the defendant was a participant in a drug trafficking  
13 organization. No information is provided to establish probable cause to believe that any  
14 criminal acts had taken place at the home. The police used the video device to secretly  
15 and continuously monitor and record all activities at the defendant's home. The  
16 defendant's home is located in a remote agricultural area north of the Snake River  
17 approximately 10.5 miles from the Franklin County Courthouse. Attached is a printout  
18 from Google Maps and a photograph printed from the Franklin County website which  
19 depict the remote home site. The video surveillance was a "fishing expedition" to further  
20 the criminal drug investigation by continuously spying on the defendant, his home, his  
21 family and all visitors based upon unspecified hearsay information.

22 The camera was installed on April 4, 2013. On May 2, 2013, after nearly a month  
23 of surveillance, the defendant was observed (recorded) walking from his backyard to the  
24 frontyard to target shoot a pistol. A copy of the police report at Bates page No.  
25  
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27  
28 MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS- 2

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1 00000029, is attached. The target shooting activity confirms the remoteness and  
2 expectation of privacy. Later video surveillance revealed other firearms and target  
3 practice sessions. Further investigation showed that the firearms were shipped in  
4 interstate commerce and that the defendant was an undocumented alien. Agents  
5 subsequently obtained search warrants and seized firearms and contraband including  
6 drugs from the defendant's home and vehicles.

7

## ARGUMENT

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10 The techniques and practices of video surveillance have developed to the degree  
11 that the practice of secret, prolonged, continuous police video surveillance of the area  
12 near a home, like a surreptitious wiretap or gps monitoring of an automobile, is a search  
13 subject to the warrant requirement of the Fourth Amendment because such surveillance  
14 intrudes upon the defendant's reasonable expectation of privacy. Clearly, continuous,  
15 long term secret video surveillance of the home reveals information about daily activities  
16 and patterns of everyone living at the home or visiting that, as a practical matter, would  
17 remain private without the aid of the technology. US v. Nerber, 222 F.3d 597 (9<sup>th</sup> Cir.  
18 2000) citing US v. Taketa, 923 F.2d 665 (9<sup>th</sup> Cir. 1991) and US v. Cuevas-Sanchez, 821  
19 F.2d 248 (5<sup>th</sup> Cir. 1987).

20

21 The Defendant asserts this pole camera surveillance was a search subject to  
22 Fourth Amendment protection which required a warrant. US v. Koyomejian, 970 F.2d  
23 536 (9<sup>th</sup> Cir. 1992); US v. Nerber, 222 F.3d 597 (9<sup>th</sup> Cir. 2000). No exception to a  
24 warrant applies and the evidence seized without a warrant should be suppressed as  
25

1 fruit of the poisonous surveillance. US v. Taketa, 923 F.2d 665, 677 (9<sup>th</sup> Cir. 1991);  
 2 Nerber, *supra* at 605.

3 To establish Fourth Amendment Protection, an individual must show he has a  
 4 reasonable expectation that his activities would be private, and that his expectation is  
 5 one that society is prepared to recognize as reasonable. United States v. Bautista, 362  
 6 F.3d 584 (9<sup>th</sup> Cir 2004); Nerber, *supra*.

7 Nerber, at 222 F.3d p. 606, note 9, states:

8       This circuit has joined numerous others in holding that the Fourth  
 9 Amendment imposes similar warrant requirements on the government's  
 10 use of video surveillance as the wiretap statute imposes upon the use of  
 11 audio surveillance. See Koyomejian, 970 F.2d at 542.

12      Video surveillance is subject to higher scrutiny under the Fourth Amendment.  
 13 Taketa, 923 F.2d at 675. The Ninth Circuit has held that the Fourth Amendment forbids  
 14 warrantless videotaping of a private office, *id.* at 678, and hotel rooms, Nerber, *supra* at  
 15 604. Video surveillance of the home and curtilage has been subjected to Fourth  
 16 Amendment analysis. US v. Cuevas-Sanchez, 821 F.2d 248 (5<sup>th</sup> Cir. 1987).  
 17 "Cuevas's expectation to be free from this type of video surveillance in his backyard is  
 18 one that society is willing to recognize as reasonable." *Id.* at 251. See also US v.  
 19 Maynard, 615 F. 3d 544 (D.C. Cir. 2010), re-hearing denied, sub nom. US v. Jones, 625  
 20 F. 3d 766 (D.C. Cir. 2010).

21      The court in Nerber, *supra*, reviewed several Fourth Amendment video  
 22 surveillance cases and concluded that the nature of the intrusion by the government can  
 23 effect a citizen's legitimate expectation of privacy. That court recognized a "temporary  
 24

1 zone of privacy" may be protected from video surveillance even in a place not owned or  
 2 ordinarily controlled. That court states at 222 F.3d 602-604:

4        This principle has been applied in several Court of Appeals  
 5 decisions as well. In United States v. Taketa, 923 F.2d 665 (9<sup>th</sup> Cir. 1991),  
 6 government agents, who suspected DEA agent O'Brien of wrongdoing,  
 7 physically searched his office and installed a hidden surveillance camera.  
 8 The camera caught O'Brien and a co-worker, Taketa, conducting an illegal  
 9 wiretapping operation. We ruled that although Taketa did not have  
 "standing" to challenge the physical search of O'Brien's office, he could  
 invoke the Fourth Amendment to suppress the video surveillance of  
 himself:

10      Here, Taketa has no general privacy interest in  
 11 O'Brien's office, but he may have an expectation of privacy  
 12 against being videotaped in it . . . Persons may create  
 13 temporary zones of privacy within which they may not be  
 14 videotaped . . . even when that zone is a place they do not  
 own or normally control, and in which they might not be able  
 reasonably to challenge a search at some other time or by  
 some other means.

15      Id. at 676-77.

16      In United States v. Cuevas-Sanchez, 821 F.2d 248 (5<sup>th</sup> Cir. 1987),  
 17 the court ruled that the installation of a surveillance camera on a power  
 18 pole to videotape activities in a suspect's backyard constitutes a "search"  
 19 within the meaning of the Fourth Amendment. The Fifth Circuit, like the  
 20 Supreme Court in Bond, distinguished cases involving surveillance of  
 property from the air:

21      To measure the government's intrusion we must  
 22 consider the expectations of society. Ciraolo teaches us that  
 23 a fly-over by a plane at 1,000 feet does not intrude upon the  
 24 daily existence of most people; we must now determine  
 25 whether a camera monitoring all of a person's backyard  
 26 activities does. This type of surveillance provokes an  
 27 immediate negative visceral reaction: indiscriminate video  
 surveillance raises the spectre of the Orwellian state. Here,  
 unlike in Ciraolo, the government's intrusion is not minimal.  
 It is not a one-time overhead flight or a glance over the fence

1 by a passer-by. Here the government placed a video  
 2 camera that allowed them to record all activity in Cuevas's  
 3 backyard. It does not follow that Ciraolo authorizes any type  
 4 of surveillance whatever just because one type of minimally  
 5 intrusive aerial observation is possible . . . . Cuevas's  
 6 expectation to be free from this type of video surveillance in  
 7 his backyard is one that society is willing to recognize as  
 8 reasonable.

9  
 10       Cuevas, 821 F.2d at 251. While Cuevas had no legitimate  
 11 expectation to be free from occasional "snooping" into his backyard from a  
 12 passing airplane, he did have a legitimate expectation to be free from  
 13 constant video surveillance.  
 14

15       ....  
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17       The unmistakable message of these cases is that the legitimacy of  
 18 a person's expectation of privacy may depend on the nature of the  
 19 intrusion. In assessing defendants' expectation of privacy under the facts  
 20 of this case, we must consider the severity of the intrusion to which they  
 21 were subjected.  
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23       ....  
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25       The objective reasonableness of defendants' privacy expectation  
 26 presents a closer question. The governmental intrusion was severe.  
 27 Hidden video surveillance is one of the most intrusive investigative  
 28 mechanisms available to law enforcement. The sweeping, indiscriminate  
 manner in which video surveillance can intrude upon us, regardless of  
 where we are, dictates that its use be approved only in limited  
 circumstances. As we pointed out in Taketa, the defendant had a  
 reasonable expectation to be free from hidden video surveillance because  
 "the video search was directed straight at him, rather than being a search  
 of property he did not own or control . . . . [and] the silent, unblinking lens  
 of the camera was intrusive in a way that no temporary search of the office  
 could have been." Id. at 677. As Judge Kozinski has stated, "every court  
 considering the issue has noted [that] video surveillance can result in  
 extraordinarily serious intrusions into personal privacy . . . . If such  
 intrusions are ever permissible, they must be justified by an extraordinary  
 showing of need. " United States v. Koyomejian, 970 F.2d 536, 551 (9<sup>th</sup>  
 Cir. 1992) (Kozinski, J., concurring). And, as the Fifth Circuit said, hidden  
 video surveillance invokes images of the "Orwellian state" and is regarded  
 by society as more egregious than other kinds of intrusions. Cuevas, 821

F.2d at 251. See also *United States v. Mesa-Rincon*, 911 F.2d 1433, 1442 (10<sup>th</sup> Cir. 1990) ("Because of the invasive nature of video surveillance, the government's showing of necessity must be very high to justify its use"); *United States v. Torres*, 751 F.2d 875, 882 (7<sup>th</sup> Cir. 1984) ("We think it . . . unarguable that television surveillance is exceedingly intrusive, especially in combination (as here) with audio surveillance, and inherently indiscriminate, and that it could be grossly abused--to eliminate personal privacy as understood in modern Western nations").

In *U.S. v. Anderson-Bagshaw*, No. 12-3074, 6<sup>th</sup> Cir., Dec. 19, 2012(Cert. Den. April 22, 2013), the majority held it was not necessary to decide in that case whether long-term video surveillance of curtilage requires a warrant, but in dicta states:

Nonetheless, we confess some misgivings about a rule that would allow the government to conduct long-term video surveillance of a person's backyard without a warrant. Few people, it seems, would expect that the government can constantly film their backyard for over three weeks using a secret camera that can pan and zoom and stream a live image to government agents. We are inclined to agree with the Fifth Circuit that "[t]his type of surveillance provokes an immediate negative visceral reaction." *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5<sup>th</sup> Cir. 1987) (stating in dicta that using a pole camera to view curtilage over a 10-foot fence constitutes a Fourth Amendment search). We also note that Ciraolo involved a brief flyover, not an extended period of constant and covert surveillance.

The concurring opinion of Justice Karen Nelson Moore in *Anderson-Badshaw*, supra would reach and hold that the Fourth Amendment protects against secret continuous video monitoring of residential property, and concludes at page 50-51 as follows:

In *United States v. Oliver*, 686 F.2d 356 (6<sup>th</sup> Cir. 1982) (en banc), aff'd, 466 U.S. 170 (1984), even as we robustly affirmed the open-fields doctrine, we maintained that the Fourth Amendment "would protect a person in an open field." 686 F.2d at 360. This makes sense, because the Fourth Amendment "protects people, not places." *Katz*, 389 U.S. at 351. We explained that the Fourth Amendment principles articulated by courts protects privacy by "establish[ing] an environment in which

1 individual emotional and mental processes can develop freely without  
2 surveillance or interference.” Oliver, 686 F.2d at 360 (emphasis added).  
3 This important freedom is threatened by the severely intrusive tactics used  
4 to monitor continuously Bagshaw’s activities on her residential property-  
5 warrantless, long-term secret video surveillance. Bagshaw’s expectation  
6 that she would not be monitored continuously on her own property is  
reasonable. In sum, I would hold that the video surveillance obtained  
using the pole camera in this case was an unreasonable search which  
violated Bagshaw’s Fourth Amendment rights.

## 7 CONCLUSION

8 The use of the pole camera here was an unreasonable search which  
9 violated the defendant’s Fourth Amendment rights. Mr. Vargas has a reasonable  
10 expectation to be free from secret, long-term, continuous video surveillance of his  
11 home by police for a criminal investigation. The expectation is one society is  
12 willing to recognize as reasonable. The remote character of the defendant’s  
13 home is such that his expectation of privacy in his front yard is equally as  
14 reasonable as the back. This is especially true in the context of intense, secret,  
15 long term, continuous video surveillance of the home including the front door.  
16

17 The intrusive nature of secret, continuous, long-term video surveillance of  
18 the home, its residents and guests is spying by the police subject to Fourth  
19 Amendment protection. This was a fishing expedition conducted in violation of  
20 defendants reasonable expectation of privacy and without judicial sanction. A  
21 warrant was required. There is no applicable exception to the warrant. All  
22 evidence derived from the surveillance must be suppressed as fruit of the  
23 poisonous surveillance, including all firearms and drugs.  
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28 **MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS- 8**

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1 Respectfully submitted this 19th day of September, 2013.  
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s/John S. Matheson  
JOHN S. MATHESON, WSBA No. 8288  
Attorney for Defendant

**MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS- 9**

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1                   **CERTIFICATE OF SERVICE**  
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I hereby certify that on September 19, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/EDF System which will send notification of such filing to the following: Alex Ekstrom, Assistant United States Attorney

s/John S. Matheson  
John S. Matheson, WSBA No. 8288  
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**MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS- 10**

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